

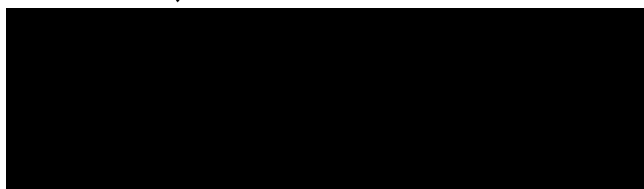
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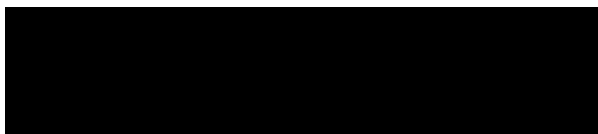
U.S. Citizenship
and Immigration
Services



FILE: EAC 02 188 52204 Office: VERMONT SERVICE CENTER

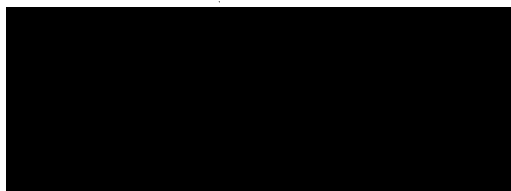
Date: APR 22 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional financial information in support of the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is April 25, 2001. The beneficiary's salary as stated on the approved labor certification is \$12.00 per hour or \$24,960 per annum. The record indicates that the petitioner was established in 1997 and is organized as a corporation.

As evidence of its ability to pay, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for the year 2000, copies of two March 31, 2002, bank statements, and a copy of its quarterly federal tax return for the quarter ending March 31, 2002. The 2000 corporate income tax return suggests that the petitioner's tax returns are based on a standard calendar year. In 2000, it reported taxable income before net operating loss (NOL) deduction and special deductions of \$5,815. Schedule L of this tax return shows that the petitioner had \$24,543 in current assets and \$16,431 in current liabilities, producing net current assets of \$8,112. CIS will review net current assets as part of the determination of a petitioner's ability to pay the proffered wage. Net current assets represent cash or cash equivalents that would reasonably be available to pay a beneficiary's proposed salary during the year covered by the balance sheet as shown in Schedule L of a petitioner's federal tax

return. The petitioner's quarterly federal tax return indicates that it had three employees during the quarter ending March 31, 2002.

On October 15, 2002, the director requested additional evidence from the petitioner in support of its ability to pay the proffered wage of \$24,960 as of April 25, 2001 and continuing until the present. The director also instructed the petitioner to submit copies of any Wage and Tax Statement (W-2) issued to the beneficiary if the petitioner had employed him during 2001 or 2002.

The petitioner, through counsel, responded by stating that it had not employed the beneficiary in 2001 or 2002, and included a copy of its 2001 corporate income tax return in its response. It shows that the petitioner declared a taxable income before NOL and special deductions of \$7,002. It reported current assets of \$30,486 and current liabilities of \$20,100, producing net current assets of \$10,386. Counsel also submitted a copy of the petitioner's quarterly federal tax return for the period ending September 30, 2002 and a copy of a state report of wages paid for same period. The state report reflects that the petitioner had four employees and paid \$25,000 in wages during that quarter.

The director denied the petition, determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present. The director found that the petitioner's 2001 taxable income of \$7,002 before NOL and special deductions was less than the proffered wage. The AAO agrees and notes that the petitioner's net current assets of \$10,386 was also substantially less than that needed to pay the proffered salary.

On appeal, counsel asserts that financial resources were available in the petitioner's accounts at two financial institutions. Copies of the petitioner's bank statements from September 30th through December 31, 2001 are submitted from one bank, and copies of eight months of 2001 statements from the other bank are submitted in support of counsel's assertion. There has been no proof presented, however, to show that the 2001 balances relevant to the period covering the petitioner's priority date somehow represent additional funds beyond those figures presented in the petitioner's 2001 tax return. Simply going on record without supporting documentation is insufficient for purposes of meeting the burden of proof in these matters. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). It is also noted that 8 C.F.R. § 204.5(g)(2) requires evidence in the form of audited financial statements, federal tax returns or annual reports. While additional material may be considered, it must demonstrate sufficiently persuasive independent probative value to be considered as a substitution for the fundamental evidentiary requirements. For similar reasons, the unaudited, internally generated financial statement, submitted on appeal, representing the petitioner's financial data for the first six months of 2002, is also unconvincing. The regulation at 8 C.F.R. § 204.5(g)(2) neither states nor implies that an unaudited financial statement is an acceptable form of evidence of the petitioner's ability to pay the proposed wage offer.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V.*

Feldman, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Following a review of the tax returns and other evidence contained in the record, and after consideration of the financial data further presented on appeal, the AAO cannot conclude that the petitioner has persuasively demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.